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Supreme Court of the United States

OCTOBER TERM, 1954.

No. 385

MARY I. DANIMAN, MEYER CASE, LOUIS COHEN, HENRY F. MINS, LOUIS RELIN, LOUIS SPINDELL, IRVING GLUCKSMAN and MORRIS SELTZER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

VERA SHLAKMAN, BERNARD F. RIESS, SARAH R. RIEDMAN, HENRIETTA A. FRIEDMAN and MELBA PHILLIPS,

Appellants,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Appellee.

JURISDICTIONAL STATEMENT.

September 27, 1954.

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THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE
COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT.

Appellants in each of the above cases (heard on a single record in the Court below) appeal from a final order of the Court of Appeals of the State of New York dismissing their petitions for reinstatement to their positions as teachers in institutions maintained by the appellee boards, from which positions they maintain they have been ousted under circumstances violative of rights secured to them by the United States Constitution.

OPINIONS BELOW.

(a) The cases are reported below as follows: 202 Misc. 915, 118 N. Y. Supp. (2d) 487; 282 App. Div. 717 and 718, 122 N. Y. Supp. (2d) 905 and 286; 306 N. Y. 532, 119 N. E. (2d) 373; 307 N. Y. 806. The opinion at *nisi prius* will be found at pages 213-233 of the combined record; the opinions of the Appellate Division will be found at pages 237-241 of the combined record; the opinion of the Court of Appeals and its memorandum on denial of reargument are appended to this statement, at p. 14 and p. 29, respectively.

JURISDICTION.

(b) The jurisdiction of this Court is invoked to vindicate the rights of appellants under the privilege against self-incrimination contained in the Fifth Amendment to the Constitution of the United States, and under the due process clause of the Fourteenth Amendment.

(*i*) The proceeding was in the nature of a mandamus proceeding to review and annul the action taken by the appellee boards of education in declaring, without notice or hearing, that appellants, teachers with tenure, had automatically forfeited their positions by invoking the privilege against self-incrimination before a subcommittee of the United States Senate Committee on the Judiciary. The proceeding was brought under Article 78 of the Civil Practice Act of the State of New York. The Supreme Court of the State of New York, Kings County, having before it the petitions (R., 13-24, 126-138) and the answers (R., 25-125, 139-212) granted the motions of the respective appellees to dismiss the petitions. The Appellate Division of the Supreme Court, Second Department, affirmed the order of dismissal, by a 3-to-2 vote. The Court of Appeals affirmed the Appellate Division by a 4-to-3 vote. A petition filed by

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all the appellants, including Harry Slochower, a petitioner below (who appears by separate counsel in this Court, as he did upon the arguments in the appellate courts below), seeking "amendment of remittitur to show federal question, or, in the alternative, for reargument to permit more explicit presentation of federal question" was denied as to all appellants except Harry Slochower, and granted as to him to the extent of recalling and amending the remittitur to show that certain federal questions were raised by him.

(*ii*) The decree sought to be reviewed is the order of the Court of Appeals affirming the order appealed from in each case. The order of the Court of Appeals was dated April 22, 1954, and was filed in the office of the Clerk of the Supreme Court, Kings County, on April 23, 1954. It was recalled for amendment by order of the Court of Appeals dated July 14, 1954, and after being amended as described in the preceding paragraph, was filed in the office of the Clerk of the Supreme Court, Kings County, on July 14, 1954. The notices of appeal to this Court were filed in the Supreme Court of the State of New York, Kings County, on September 7, 1954.

(*iii*) Jurisdiction in this Court is asserted on the authority of 28 U. S. C. §1257(2).

(*iv*) Cases which are believed to sustain the jurisdiction are:

Clallam County v. *United States*, 263 U. S. 341;
United States v. *Lovett*, 328 U. S. 303;
Adler v. *Board of Education*, 342 U. S. 485;
Wieman v. *Updegraff*, 344 U. S. 183;
Adams v. *Maryland*, 347 U. S. 179;
Barsky v. *N. Y. University*, 347 U. S. 442.

STATUTE INVOLVED.

(v) The statute involved, which, as interpreted and applied by the Courts below, has impaired rights guaranteed to the appellants by the Fifth and Fourteenth Amendments to the United States Constitution, is New York City Charter §903. The text of the statute is as follows (Williams' New York City Charter and Administrative Code, Annotated, p. 137):

> "§903. Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

QUESTIONS PRESENTED.

(c) The questions presented by this appeal are these:

(1) Whether the application of penal consequences (automatic forfeiture of public employment and disqualification from all future employment by the City of New

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York, in either elective or appointive positions) to the assertion of a federal right (the privilege against self-incrimination guaranteed by the Fifth Amendment) before a federal body (a subcommittee of the Committee on the Judiciary of the United States Senate) is not a violation of appellants' rights under the Fifth Amendment.

(2) Whether there was not a form of entrapment and a denial of due process in violation of the Fourteenth Amendment in applying to appellants the forfeiture provisions of §903, *supra*, which purports to deprive city employees of their jobs upon refusal (through invocation of the privilege against self-incrimination) to testify before an authorized body regarding the property, government or affairs of the city, or appellants' official conduct, when the body conducting the hearings (a subcommittee of the United States Senate) at which the privilege was invoked expressly disclaimed (R., 28) that it had either the authority or the intent to inquire into these matters. Note in this connection the following language used by Senator Ferguson at the opening of the hearing (R., 26): "The subcommittee gives full recognition to the fact that education is primarily a state and local function".

(3) Whether the Court of Appeals of the State of New York did not fail to give proper respect and effect to the decision in *Adams* v. *Maryland*, 347 U. S. 179 (1954), which, though decided after the oral argument, was called to the attention of the Court of Appeals in the petition for reargument.

MATERIAL FACTS.

(d) Appellants were teachers with tenure employed in the New York City public school system (operated by appellee the Board of Education of the City of New York)

and in the group of public colleges in New York City (operated by appellee The Board of Higher Education of the City of New York). The average length of service of appellants was upwards of 21 years. In September, 1952 appellants, together with other members of the teaching staffs, were subpoenaed to appear before the Subcommittee to Investigate the Administration of the Internal Security Act (64 Stat. 1032) and other Internal Security Laws, this being a subcommittee of the Committee on the Judiciary of the United States Senate.

Appellants were interrogated by the subcommittee as to past and present membership and activity in the Communist Party. They refused to answer, invoking the Fifth Amendment (R., 31, 33, 34, 40-42, 44, 139, 140, 149-153). Their claim of the privilege was sustained by the subcommittee (R., 32-36, 38-40, 44-46).

Senator Ferguson, who conducted the subcommittee hearings, disclaimed that the hearings were concerned with the "government, property or affairs of the city" or with the "official conduct" of appellants as city employees. The following colloquy with counsel for appellants occurred (R., 28):

> "Mr. Cammer: * * * I understood from Senator Ferguson, that this was a federal committee not concerned with local affairs or local problems. Again I emphasize this is not by way of an objection. I thought Senator Ferguson had made it pretty plain that you were not concerned with the property, affairs or government of the city, or with the nomination, election, appointment or official conduct of city employees.
>
> Senator Ferguson: Our questions aren't aimed at that."

And see the quotation, *ante*, p. 5, from R., 26.

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Thereafter they received letters of dismissal, premised upon the application of §903 in that they had refused to answer questions before an "authorized body" on the grounds of privilege, as to "the government, property, or affairs of the city" or "their official conduct" as city employees. By reason of the applicability of §903 (which we have consistently disputed) their positions were declared forfeited without the formality of notice of charges or a hearing. These proceedings were thereupon instituted.

Appellants asserted below that the conduct of the appellee boards in dismissing them violated their rights under the First, Fifth and Fourteenth Amendments of the United States Constitution (R., 17, 20, 23, 126, 216-222). They argued, also, that the Committee on the Judiciary was not an "authorized body" within the purview of §903, since there is a want of power in any federal body (such as a subcommittee of the United States Senate) to inquire into the property, government and affairs of cities and into the official conduct of public school or public college teachers. This was a federal constitutional question within the broader definition laid down in *Clallam County* v. *United States*, 263 U. S. 341, 344 (1923).

In this context we called to the attention of the Appellate Division and of the Court of Appeals such decisions of this Court as *Kentucky* v. *Dennison*, 24 How. 66, 107-108 (1861); *Newton* v. *Commissioners*, 100 U. S. 548 (1879), and *Wilson* v. *North Carolina*, 169 U. S. 586 (1898).

The Court of Appeals held that the subcommittee which had subpoenaed the appellants had the authority to do what the subcommittee had disclaimed any intention to do, viz., inquire into the official conduct of the appellant teachers (*post*, p. 19), and that the appellants had, in consequence, automatically vacated their respective positions.

At this juncture we desire to call the Court's attention to the ruling by the Court of Appeals in the supplemental opinion denying to all but one of the appellants the right to have the remittitur amended to show that questions under the United States Constitution were raised and passed upon by the Court of Appeals. The Court held that a single petitioner below, Harry Slochower, a party to the proceeding against The Board of Higher Education, who appeared by separate counsel, had raised three federal questions and that the other appellants had not. These questions, as is shown *post*, p. 29, were:

> "(1) That the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled;
>
> (2) That the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct; and
>
> (3) That at the time of the inquiry, there had been no determination under the Feinberg Law [N. Y. L. 1949, ch. 360] that the Communist Party was a 'subversive' organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited."

We maintain that the first of these questions was raised by us at pages 20 and 126 of the record, and that the second of these questions was raised at pages 30-35 of our brief in the Court of Appeals, as well as at pages 28-33 of our brief in the Appellate Division. A copy of each brief is

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included in the record. In addition, we raised questions under the First, Fifth and Fourteenth Amendments, as shown *ante*, p. 7, and as shown in the opinion of the Court of Appeals, *post*, pp. 18-19. We did not raise the third question.

The reason why certain constitutional questions—*e.g.*, the right of the State to qualify, or to subject to onerous consequences the invocation of a federally guaranteed right before a federal investig ting body—were only raised in a petition for reargument or for amendment of remittitur, is because we thought (as did the three dissenting Judges—*post*, p. 27) that a long and unbroken line of cases had established beyond the possibility of overthrow the proposition that teachers were State employees and not City employees, and hence were not to be deemed within the scope of Charter §903, *supra*, which dealt with the affairs of the city and the conduct of city employees. The contrary holding took us by surprise; and also took the Commissioner of Education of the State of New York by surprise, as appears from par. 6 of the affidavit in support of our petition for reargument in the Court of Appeals. Furthermore a strong decision in this Court on the lack of power in the States to condition or qualify the exercise of a federally guaranteed right before a federal body, *Adams* v. *Maryland*, 347 U. S. 179 (1954), was not decided until several months after the oral argument, and could not have been employed in the filed briefs. It was called to the Court's attention at pp. 15, 17, 19 of our petition for reargument.

We argued also that the application of §903 in the face of the disclaimer of the subcommittee (R., 28) and their assurance that its questions were "not aimed at" the very subjects which alone bring that section into operation, was a denial of due process.

THE QUESTIONS ARE SUBSTANTIAL.

(e) This case raises important and novel federal questions which have never been passed on by this Court concerning the meaning and scope of the constitutional right embodied in the Fifth Amendment not to be compelled to be a witness against oneself. In addition the case involves issues similar to those recently presented in *Spector* v. *United States*, 193 Fed. (2d) 1002 (9th Circ., 1952), and *United States ex rel. Belfrage* v. *Shaughnessy*, 212 Fed. (2d) 128, 130 (2nd Circ., 1954), concerning the propriety of the attachment of what are in essence penal consequences (*United States* v. *Lovett, supra*, p. 3) to the assertion by the appellants of their privilege against self-incrimination.

1. The sanction of automatic dismissal from employment as a teacher and the disqualification from all future municipal employment, whether in elective or appointive positions, as a penalty for having asserted the traditional right not to be compelled to be a witness against oneself violates and nullifies the Fifth Amendment. Appellants contend that *governmental* imposition of the penalty of economic destruction for assertion of this constitutional right is not so far different from the lash and the pillory as to make inapplicable the historical principle inherent in Anglo-Saxon law since *Lilburn's Case*, 16 Car. I, c. 10 (1641). And we contend that the sanction of governmental disqualification from all future employment by the City of New York, merely for having asserted a constitutional right, inflicts a punishment without a trial and violates the constitutional proscription against bills of attainder.

Appellants further contend that even if the validity of such legislation be assumed *arguendo* in a situation where

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the refusal pertains to an inquiry directly related to the employee's conduct, as in the case of a policeman asserting the privilege in an inquiry relating to corruption (*Canteline* v. *McClellan*, 282 N. Y. 166, 25 N. E. [2d] 972 [1940]), or a fireman's participation in arson (*Christal* v. *Police Commission*, 33 Cal. App. [2d] 564, 92 Pac. [2d] 416 [1939]), the due process clause is violated when the only possible nexus between the exercise of the privilege against self-incrimination and the dismissal of appellants from their positions rests upon their exercise of the privilege in an area not related to their official conduct and at a time when their official conduct had been excluded from the investigation by the express disclaimer of the investigating committee itself.

For views as to the effect of invoking the privilege which seem to be more in harmony with this Court's decisions, we beg leave to cite *Matter of Grae*, 282 N. Y. 428, 26 N. E. (2d) 963; *Matter of Ellis*, 282 N. Y. 435, 26 N. E. (2d) 967 (1940); *In re Holland*, 377 Ill. 346, 36 N. E. (2d) 543 (1941); *Ex parte Marshall*, 165 Miss. 523, 147 So. 791 (1933).

Even if such relationship might otherwise have been held to exist between the questions put by the subcommittee and the "official conduct" of appellants, there is an essential denial of due process and of fair play in the holding that they had refused to answer questions pertaining to their official conduct when they had been expressly told by the subcommittee that the questions were not aimed at their official conduct, nor at the property, government or affairs of the city. This express denial of notice that their positions were in jeopardy was aggravated by the fact that the statute was construed below as self-executing, thus effectuating the automatic forfeiture of their positions and

their disqualification from future municipal employment—all without notice, or hearing, or opportunity to explain. Appellants were thus punished on a charge never made and of which they had received no warning or notice. *Cole* v. *Arkansas*, 333 U. S. 196 (1948); *In re Oliver*, 333 U. S. 257 (1948).

The case also involves, under the construction given the statute by the Court of Appeals, questions concerning the authority of a Senate subcommittee to inquire into the "official conduct" of teachers in the field of public education, heretofore regarded as purely a state function. We contend that the Committee had no such power. The qualifications and competence of teachers in state institutions lie outside the competence of the Federal government, and, in consequence, under *McGrain* v. *Daugherty*, 273 U. S. 135, 175 (1927), lie outside the field of inquiry which a senatorial committee has authority to explore.

Conversely, the case involves questions concerning the power of a State to attach onerous conditions to the exercise of a federally protected constitutional right before a federal body. Assuming that the State may inhibit or restrict or even abolish the privilege before its own tribunals and in the conduct of its own proceedings (*Adamson* v. *California*, 332 U. S. 46 [1947]; *Palko* v. *Connecticut*, 302 U. S. 319 [1937]), does it follow that it may inhibit, restrict or effectively abolish the privilege by extending its compulsion to proceedings before federal agencies? We believe not. See *Adams* v. *Maryland*, 347 U. S. 179 (1954); see also *Amalgamated Association, etc.* v. *Wisconsin Employment Relations Board*, 340 U. S. 383, 389 (1951); *Frost & Frost Trucking Co.* v. *R. R. Comm. of California*, 271 U. S. 583 (1926). It may be that as the result of the appearance of the appellants before the subcommittee, the appellees would

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have been warranted in initiating their own inquiry into the "official conduct" of the appellants, at which appellants would have the opportunity, after notice that their tenure was involved, to pursue such course of action as to them might seem appropriate. But we believe that the imposition of a severe state sanction under circumstances where the refusal was federally sanctioned is a violation of due process. *Adamson* v. *California*, 332 U. S. 46 (1947); *Tot* v. *United States*, 319 U. S. 463 (1943).

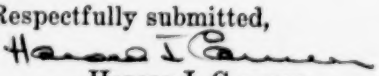
If any of the foregoing contentions are valid, and each is independent of the other, appellants have been denied an important and historic federal right in a matter of public importance, and at a time when preservation of these rights is of unprecedented moment. See Hon. CHARLES E. CLARK, *The Illimitable Freedom of the Human Mind*, 4 College Public Relations Quarterly, July, 1953, pp. 3, 6-7.

Conclusion.

Probable jurisdiction should be noted.

September 27, 1954.

Respectfully submitted,



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APPENDIX.

Opinion of Court of Appeals

In the Matter of Mary I. Daniman et al., Appellants, against Board of Education of the City of New York, Respondent.

In the Matter of Vera Shlakman et al., Appellants, against Board of Higher Education of the City of New York, Respondent.

Argued November 24, 1953; decided April 22, 1954.

Appeal, in each of the above-entitled proceedings, from orders of the Appellate Division of the Supreme Court in the second judicial department, entered June 15, 1953, which affirmed, by a divided court, orders of the Supreme Court at Special Term (F. E. Johnson, J.), entered in Kings County, denying an application under article 78 of the Civil Practice Act for an order directing respondent, constituting the board of education of the City of New York in the first proceeding, and the board of higher education of the City of New York in the second proceeding, to annul the dismissal of petitioners from their positions as teachers and to reinstate them without prejudice.

Conway, J. Petitioners who are teachers—the first group in public schools, the second group in public colleges—were subpoenaed and appeared in September and October of 1952 before Senator Homer Ferguson, sitting in New York as a subcommittee of the Committee on the Judiciary of the Senate of the United States to investigate the administration of the Internal Security Act and other internal security laws.

Among other questions each of the petitioners was asked whether he or she was presently or had ever been a member of the Communist party. Each of them refused to answer, basing the refusal upon the privilege against self incrimination granted by the Fifth Amendment to the United States Constitution.

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Appendix.

The board of education and the board of higher education received certified copies of the transcript of the minutes of the hearing. Each of these boards was advised by the corporation counsel of the City of New York that the refusal to answer questions on the only ground which was sustained, viz., the privilege granted by the Fifth Amendment, constituted a refusal to answer the respective questions on the ground that the answer would tend to incriminate within the meaning of section 903 of the New York City Charter and that questions directed to employees of the boards concerning past or present membership in the Communist party constituted an inquiry into the employees' official conduct within the purview of the same section. Thereupon, the boards adopted resolutions terminating the employment of petitioners and declaring their positions vacant pursuant to the provisions of section 903. There is no claim by petitioners that their refusal to answer the questions based upon the privilege granted them by the Fifth Amendment does not constitute a refusal to answer upon the ground that the answer would tend to incriminate them within the meaning of Charter section 903, but only that the section, for various reasons to be discussed, is not applicable.

In this proceeding we are required to and do accept as truthful petitioners' assertion that answers to the questions propounded might have tended to incriminate them since that is the only reason that persons questioned by a congressional committee concerning their affiliation with the Communist party are entitled to invoke the protection of the Fifth Amendment to the United States Constitution (see *Blau* v. *United States*, 340 U. S. 159). Similarly, we do not presume, of course, that these petitioners by their action have shown cause to be discharged under the Feinberg Law (L. 1949, ch. 360) since no inference of membership in the Communist party may be drawn from the assertion of one's privilege against self incrimination.

Appendix.

Section 903 reads: "If any councilman or other officer or *employee* of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, *any legislative committee,* or *any* officer, board or body authorized to conduct *any* hearing or inquiry, *or having appeared shall refuse* to testify or to *answer any question* regarding the property, government or affairs of the city or of any county included within its territorial limits, *or regarding* the nomination, election, appointment or *official conduct* of any officer *or employee* of the city or of any such county, *on the ground that his answer would tend to incriminate him,* or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency." (Emphasis supplied.)

Section 903 is inoperative if the teacher gives either an affirmative or negative answer to the question posed—even though the answer be false. The effect of the answer on the teacher's fitness to continue teaching is for the board of education or of higher education, and those bodies only, to say. Section 903 becomes applicable only if the teacher witness refuses to answer upon the ground that the answer would tend to incriminate him or her. The teacher alone possesses the power to bring the statute into play. The assertion of the privilege against self-incrimination is equivalent to a resignation (*Matter of Koral* v. *Board of Educ. of City of N. Y.*, 197 Misc. 221). As the Supreme Court said in *Adler* v. *Board of Educ.* (342 U. S. 485, 492, affg. *sub nom. Thompson* v. *Wallin*, 301 N. Y. 476): "It is equally clear that they [teachers] have no right to work for the state in the school system on their own terms. [Case cited.] They may work for the school system upon the reasonable terms laid down by the proper authorities

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of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere." And, many years ago Justice Holmes in *McAuliffe* v. *New Bedford* (155 Mass. 216, 220) said similarly: "The petitioner [a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control."

There is nothing novel about such a statute. Other statutes provide for the vacatur of, or forfeiture of, an office or employment upon the happening of an event specified therein. (See, e.g., Greater New York Charter, § 1549, now New York City Charter, § 895; *Matter of Hulbert* v. *Craig*, 124 Misc. 273, affd. 213 App. Div. 865, affd. 241 N. Y. 525; *Metzger* v. *Swift*, 231 App. Div. 598; *Metzger* v. *Swift*, 258 N. Y. 440; Public Officers Law, § 30; *Matter of Buhler*, 43 Misc. 140; *Ginsberg* v. *City of Long Beach*, 286 N. Y. 400.) The people have similarly provided in our State Constitution as to all public officers who refuse to sign waivers of immunity under certain circumstances (art. I, § 6, and see *Canteline* v. *McClellan*, 282 N. Y. 166, and cases cited therein).

There is no conflict between section 903 of the Charter and equally valid though differing procedures under the Feinberg Law (L. 1949, ch. 360) and under sections 2554, 2573 and 6206 of the Education Law which guarantee to teachers the right to hold their respective positions during good behavior and efficient and competent service and not to be removed except for cause after a hearing by the affirmative vote of a majority of the board. Section 903 of the Charter, the Feinberg Law and sections 2554, 2573

and 6206 of the Education Law are legislative enactments of equal dignity. The sections in the Education Law govern the removal of teachers for cause generally by the board of education and not by the city, whereas the Charter section declares that there shall be a vacatur of office or employment for a particular cause. It merely imposes a condition upon public employment. The legislative acts are to be read in harmony and it is not within our judicial competence to decide for the Legislature, the board of education or the City of New York which shall be used.

Following the adoption of the resolutions of the boards terminating the employment of petitioners, they commenced these two article 78 proceedings. Special Term concluded that section 903 applied and had been violated by petitioners. The petitions were dismissed. The Appellate Division, Second Department, affirmed, two Justices dissenting. The majority held that teachers in New York City public schools and colleges are city employees within the meaning of Charter section 903; that the Charter section is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee; that such inquiry is not barred by the provisions of sections 25 and 26-a of the Civil Service Law; that the Charter is not a local law within the meaning of section 2 of the City Home Rule Law and that the Charter provisions do not abridge the constitutional privilege against self incrimination. The dissenting Justices agreed with the majority that section 903 is applicable to a hearing before a Federal legislative committee; that an inquiry into past or present membership in the Communist party is an inquiry regarding official conduct of a city officer or employee and that the Charter is not a local law within the meaning of the City Home Rule Law. They were at variance, however, with the conclusion of the majority that petitioners were employees of the City of New York within the meaning of section 903.

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Appendix.

In this court we are all agreed that the Communist party is a continuing conspiracy against our Government. (See, *Communications Assn.* v. *Douds*, 339 U. S. 382, 425 *et seq.*; *Dennis* v. *United States*, 341 U. S. 494, 564; Preamble to the Feinberg Law (L. 1949, ch. 360, § 1).) We are also all in agreement that an inquiry into past or present membership in the Communist party is an inquiry regarding the official conduct of an officer or employee of the City of New York. Loyalty to our Government goes to the very heart of official conduct in service rendered in all branches of Government. (See N. Y. Const., art. XIII, § 1; Education Law, § 3002; Civil Service Law, §§ 12a, 30; L. 1951, ch. 233, §§ 1, 8.) Communism is opposed to such loyalty. (*Communications Assn.* v. *Douds*, 339 U. S. 382, 425 *et seq.*, *supra*; *Dennis* v. *United States*, 341 U. S. 494, 564, *supra*.) Internal security affects local as well as National Governments.

We are in disagreement in this court only as to two questions. They are (a) whether the Charter section is applicable to a hearing before a Federal legislative committee and (b) whether the petitioners are employees of the City of New York. All of the six Justices below were in accord in answering (a) in the affirmative.

As to (a), we, the majority, agree with all of the Justices below that section 903 is applicable to a hearing before a Federal legislative committee. The language in section 903 is: "*any* legislative committee, or *any* officer, board or body authorized to conduct *any* hearing or inquiry * * *." We cannot say that that language excepted a legislative committee of our National Government for we read "any" to mean "any".

As to (b), when the Legislature adopted the Charter of the City of New York and the Administrative Code it declared that it intended "to provide an administrative code for the city of New York harmonizing with the provisions of the New York city charter" (Administrative Code, § 982-1.0) and directed that the code was to be "construed liberally". (Administrative Code, § 982-2.0.) In

section 981-1.0 of the Administrative Code the Legislature defined an employee as "Any person whose salary in whole or in part is paid out of the city treasury". This language cannot be misread. Petitioners are paid by check signed by the city treasurer with funds from the city treasury.

The Education Law (§§ 2553, 6201) empowers the Mayor of the City of New York to appoint the members of the board of education and to appoint and remove the members of the board of higher education. The City Charter (§ 522) requires the board of education to submit an annual written report to the Mayor. The Education Law (§§ 2576, 6202) requires both boards to submit to the board of estimate expense budget estimates, just as city departments do; (See, also, New York City Charter, § 895); counsel for the city is their counsel (New York City Charter, § 394, subd. a; *Matter of Kay* v. *Board of Higher Educ. of City of N. Y.*, 260 App. Div. 9, motion for leave to appeal denied 285 N. Y. 859); the boards of education and higher education are before us asserting, not denying, the applicability of section 903 of the City Charter and section 982-1.0 of the Administrative Code to them and the petitioner teachers. We have, in many cases involving teachers, written that in matters *strictly* educational or pedagogic a board of education is not a department of the city government, but an independent public body; that public education is a State and not a municipal function and that it is the policy of the State to separate matters of public education from the control of municipal government. (*Matter of Hirshfield* v. *Cook*, 227 N. Y. 297, 301; *Matter of Divisich* v. *Marshall*, 281 N. Y. 170; *Titusville Iron Co.* v. *City of New York*, 207 N. Y. 203, 208; *Gunnison* v. *Board of Educ. of City of N. Y.*, 176 N. Y. 11.) We have in so doing, however, been careful to point out, as already indicated, in *Matter of Hirshfield* v. *Cook* (*supra*) that: "If the state through its legislature intends to make the board of education of the city wholly independent of municipal action and prevent the city or the officers and boards thereof from asserting any authority

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relating to matters connected with the public schools and the determination of the expenditures therefor, it should be stated by it in such clear language that its intention is 'unmistakable' " (pp. 309-310) and that: "while the educational affairs in each city are under the general management and control of the board of education, such board is subject to municipal control in matters not *strictly* educational or pedagogic." (P. 304; emphasis supplied.) Thus, board of education employment must be added to other municipally paid service in determining seniority rights under section 31 of the Civil Service Law. (*Matter of Schaefer* v. *Rathmann*, 237 App. Div. 491, 494-495, affd. 262 N. Y. 492); employees of the board of education are employees of the city under section 896 of the New York City Charter making it a crime to conspire to defraud the city (*People* v. *Engel*, 200 Misc. 60); the offices of trustee of Hunter College of the City of New York and of members of the board of higher education are offices "connected with the government of the City of New York" within the meaning of section 1549 of the Greater New York Charter (now New York City Charter, § 895) which prohibits dual office holding by city officers. (*Metzger* v. *Swift*, 258 N. Y. 440, *supra;* see, also, Education Law, §§ 2554, 2573, 6206; New York City Charter, § 896.)

The State has the power to determine what shall constitute a vacatur of public office or employment and, in enacting statutes, to *define* the terms used therein as in its wisdom it sees fit. Thus, it may define who are employees of the City of New York and we must accept the legislative definition as binding upon us. (*Matter of Bronson*, 150 N. Y. 1; McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], § 75; *People ex rel. Champlin* v. *Gray*, 185 N. Y. 196, 200.) It has made the *source* of the compen ation the determinant factor.

Petitioners are in reality asking us to take the words used to frame concepts affecting the administration of education in matters strictly educational and pedagogic

and to enlarge and expand their meaning so as to include something which transcends matters that are strictly educational and pedagogic, on the one hand, and then rewrite the Administrative Code (§ 981-1.0, subd. 7) so that the words "Any person whose salary in whole or in part is paid out of the city treasury" as used to define an employee of the city shall not mean that teachers are employees of the city, although their salaries are paid by check of the city treasurer from the city treasury. This we may not do but must take clear, simple and unambiguous words of the Legislature as we find them. (*Meltzer* v. *Koenigsberg*, 302 N. Y. 523, 525; *Matter of Rathscheck*, 300 N. Y. 346, 350, 353; *Matter of Tishman* v. *Sprague*, 293 N. Y. 42, 50.)

Finally, it is urged that at the time the Charter was approved and when it became effective in 1938 the Legislature did not have in mind the specific purpose for which section 903 is now being used. Whether or not that be true is doubtful indeed since the Supreme Court of the United States has upheld the deportation of legally resident aliens because of membership in the Communist party for periods between 1925 and 1939 in *Harisiades* v. *Shaughnessy* (342 U. S. 580). Section 903 became effective January 1, 1938. But even if it were to be accepted as true it would be of little moment here. More than fifty years ago in *Hudson Riv. Tel. Co.* v. *Watervliet Turnpike & Ry. Co.* (135 N. Y. 393, 403-404), we said: "The words of the statute are to be interpreted according to their natural and obvious meaning, and, as the terms employed are not ambiguous, extrinsic facts are not available to restrict the authority which it plainly confers. The language, literally construed, includes undiscovered, as well as existing modes of operation. * * * It would be an unjust reflection upon the wisdom and intelligence of the law-making body to assume that they intended to confine the scope of their legislation to the present, and to exclude all consideration for the developments of the future." And only recently in *Matter of Di Brizzi* (*Proskauer*) (303 N. Y. 206 [1951]), this court

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upheld the use of a statute (Executive Law, § 62, subd. 8, now § 63, subd. 8) to permit the creation of a "New York State Crime Commission", which was originally enacted a few weeks after our entry into World War I as a "Peace and Safety Act" (L. 1917, ch. 595) for the purpose of dealing with wartime sabotage, espionage and subversive activities of enemy agents and sympathizers, and the repeal of which the Attorney-General of the State had recommended to the Legislature because it was "suited to war conditions". (1918 Atty.-Gen. 16.) And so, here, section 903 protects the people of the city and the State's chartered municipalities from dangers encompassed by the language of the statute, even though the precise danger may not have been envisioned at the moment of passage.

The orders appealed from should be affirmed, without costs.

Desmond, J. (dissenting). That communism in the United States is a conspiracy against our Government, and that participation in such a conspiracy is entirely inconsistent with the loyalty required from a schoolteacher, are undisputed propositions which do not decide this case. Our duty, on this appeal, as on any other, is to apply the laws of this State as we find them, to communists, noncommunists, and everyone else. No purpose, however high or urgent, suspends the salutary rule that "statutes, directed against known and stated evils, are not to be stretched to cover situations having no real or reasonable relation to those evils (see McKinney's Cons. Laws of N. Y., Book 1, Statutes [1942 ed.], §§ 95, 141, 146, and cases cited; also *Kauffman & Sons Saddlery Co.* v. *Miller*, 298 N. Y. 38, 44, 45, and *Matter of Breen* v. *New York Fire Dept. Pension Fund*, 299 N. Y. 8, 19)" (*Metropolitan Life Ins. Co.* v. *Durkin*, 301 N. Y. 376, 381). If more or different statutes are needed to rid the schools of communist teachers, it is for the Legislature to enact them, and the New York State Legislature has shown no reluctance to do so, nor has this court hesitated to enforce them (see the "Feinberg Law",

Appendix.

Education Law, § 3022, as construed in *Thompson* v. *Wallin*, 301 N. Y. 476; *Matter of Adler* v. *Wilson*, 282 App. Div. 418, motion for leave to appeal denied 306 N. Y. 979). Ours is the judicial task, limited by judicial powers, of interpreting and applying section 903 of the New York City Charter as enacted in 1938. We find nothing in that section's language, history or known purposes to justify using it, as it is being used here, as authority for ousting public school teachers, employed by respondent board of education, because of their refusals to answer questions put to them by a subcommittee of the United States Senate, appointed to investigate the administration of the Federal Internal Security Laws, as to the teachers' past or present membership in the Communist party. All sides concede that, aside from the supposed applicability of section 903, the teachers could not be deprived of their positions, for exercising their Fifth Amendment right (see *Matter of Grae*, 282 N. Y. 428, 434). We turn then to the Charter provision, and we find it clear, concise and complete: "§ 903. • • • If any councilman or other officer or employee of the city shall, after lawful notice or process, wilfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city or any agency."

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Appendix.

Section 903 is inapplicable to these appellants in this situation for at least two separate reasons: first, no appellant is an "employee of the city" within the meaning of the law; and, second, the United States Senate group whose questions appellants refused to answer was not authorized to conduct an inquiry into the property, affairs and government of the city or the official conduct of its officers and employees.

First, as to whether these teachers are "employees of the city", section 1 of article XI of our State Constitution makes public education a State function, and the policy of this State for a century "has been to separate public education from all other municipal functions and intrust it to independent corporate agencies" such as boards of education (*Gunnison* v. *Board of Educ. of City of N. Y.*, 176 N. Y. 11, 23). "The board of education is a corporation separate and distinct from the city of New York" (*Titusville Iron Co.* v. *City of New York*, 207 N. Y. 203, 208). Matters of appointment of teachers and permanency of their employment have been, by the State Education Law, taken away from the municipalities and given to the education boards (*Matter of Emerson* v. *Buck*, 230 N. Y. 380, 385). The grants of authority to the boards to administer public education within New York City are exclusive, and negative any authority in the city itself to exercise like powers (*People ex rel. Wells & Newton Co.* v. *Craig*, 232 N. Y. 125, 135). The long struggle between the Buffalo board of education and the City of Buffalo, described in *Matter of Emerson* v. *Buck* (*supra*), was ended by this court's declaration thirty years ago, in *Matter of Fuhrmann* v. *Graves* (235 N. Y. 77, 82, 83), that, while the city controls the total amount to be expended for education, it has no control whatever over the manner of its spending (see, also, *Matter of Brennan* v. *Board of Educ. of City of N. Y.*, 245 N. Y. 8, 14). There followed an impressive train of cases holding that public schoolteachers, in the cities of the State, were employees, not of those cities but of the

local boards of education as separate corporate bodies (*Matter of Gelson* v. *Berry*, 233 App. Div. 20, 21, affd. 257 N. Y. 551; *Matter of Ragsdale* v. *Board of Educ. of City of N. Y.*, 282 N. Y. 323, 325; *Nelson* v. *Board of Higher Educ. of City of N. Y.*, 263 App. Div. 144, 148, affd. 288 N. Y. 649).

It is, therefore, indisputable, not only that the State Constitution and judicially declared State policy bar New York City from the role of "employer" of teachers, but, also, that, as between the City of New York and these teachers, there are none of the marks of an employer-employee relationship, since it is not the city, but the separate boards of education, which select and hire the teachers, pay them, control their teaching work, and are empowered to remove them for cause after hearing (see Education Law, §2, subd. 14; and §§2550, 2551, 2573, 3012, 3022, 6206). Statutes and decisions (cited in great numbers in respondent's brief) relating to other than pedagogical matters or pedagogical personnel have nothing to do with the present problem. The question here is as to whether teachers are "employees of the city". Actually, the only ground suggested for an affirmative answer to that question is the definition in section 981-1.0 of the New York City Administrative Code (a statute separate from, but complementary to, the Charter) of "employee" as "any person whose salary in whole or in part is paid out of the city treasury." The salaries of teachers are "paid out of the city treasury" from funds there on deposit to the credit of the board of education, but we refuse to believe that this sixteen-word definition, in a general statute not concerned with education, destroys the whole public policy of this State, worked out in more than a century of struggle, of seeing to it that public schoolteachers are definitely not employees of the cities of this State. Until now, there has never been a decision of this court holding any teacher to be an "employee" of a city.

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A second, and separate, reason why section 903 has no application to this situation is that this Senate subcommittee was not authorized to, and disclaimed any purpose to, conduct an inquiry into New York City's governmental affairs or the "official conduct" of any "employee" of the city or of the board of education. It may be possible, grammatically, to read the statute's language: "any legislative committee * * * authorized to conduct any hearing or inquiry" as unrelated to the later phrases in the same sentence: "regarding the property, government or affairs of the city * * * or regarding the * * * official conduct of any officer or employee of the city". But that grammatical possibility is a logical impossibility, and the result would be a statutory monstrosity, whereby an upstate town board or a legislative committee from another State could bring about the firing of a New York City employee because the latter refused to answer the questions of the interlopers, about his official conduct. We do not so construe statutes, especially since we know historically (and as respondents themselves tell us) that section 903 was one of the by-products of the "Seabury Investigation" of 1932. It is most unlikely that the New York State Legislative Committee, of which Judge SEABURY was counsel, or the Legislature itself in setting up the Charter Revision Commission in 1934, or the commission in its 1936 recommendation of a new charter for New York City, or the Legislature or the people of the city in voting for it, intended to deal with a situation where a foreign legislative body might question New York City employees about New York City's governmental affairs. What section 903 contemplates is an inquiry by a New York State, or New York City, legislative committee or officer or board or body authorized to investigate the city government. This subcommittee of the United States Senate was not and did not on this occasion claim to be such a committee, officer, board or body.

Appendix.

What section 903 means is that a city officer or employee must answer the question of a qualified investigating body concerning the city's affairs, or concerning the conduct of city business by the questioned city officer or employee, or by any other city officer or employee, or forfeit his employment. When, in 1949, the Legislature determined (see findings attached to L. 1949, ch. 360) that the Communist party had been infiltrating into public employment in the public schools, it passed the appropriate (Feinberg) Act to deal with that situation (Education Law, §3022). But the 1938 City Charter of New York dealt with something else entirely, that is, with facilitating local and State investigations of New York City affairs. Membership of teachers in the Communist party may, under the Feinberg Law, prove the teacher's unfitness to be a teacher, and Feinberg Law procedures should be used to bring about any removals for that cause. Refusal of a teacher in a properly authorized investigation, to co-operate by answering questions as to membership in subversive organizations may justify dismissal after hearing, under sections 2573 or 6206 of the Education Law, and those procedures are available and lawful.

In each case, the order should be reversed and the petition granted, with costs in all courts.

Lewis, Ch. J., Froessel and Van Voorhis, JJ., concur with Conway, J., Desmond, J., dissents in opinion in which Dye and Fuld, JJ., concur.

Orders affirmed.

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Appendix.

MEMORANDUM *PER CURIAM* ON MOTION FOR REARGUMENT AND OTHER RELIEF.

SUBMITTED JUNE 1, 1954; DECIDED JULY 14, 1954.

Motion, insofar as it seeks reargument denied. Motion, insofar as it seeks to amend remittitur, denied, except as to petitioner-appellant Slochower, on the ground that no question under the Federal Constitution was presented by them to the Court of Appeals. Motion by petitioner-appellant Slochower granted to the extent indicated. Return of remittitur requested and when returned it will be amended by adding thereto the following: Questions under the Federal Constitution were presented and passed upon by the Court of Appeals, viz., whether the rights of petitioner-appellant Slochower to due process under the Fourteenth Amendment to the Federal Constitution were violated by the construction and application herein of New York City Charter (§903), in that petitioner-appellant Slochower claims: (1) that the automatic operation of section 903 deprives him of tenure and of a trial to which he was entitled; (2) that the congressional sub-committee was not empowered to consider and specifically stated that its questions would not be directed to official conduct of city employees and that petitioner-appellant Slochower, therefore, could not have known at the time of the inquiry that the questions asked of him and which he refused to answer related to his official conduct, and (3) that at the time of the inquiry, there had been no determination under the Feinberg Law that the Communist Party was a "subversive" organization, so that membership therein would affect a teacher's eligibility and that the retroactive application of that determination is constitutionally prohibited. The Court of Appeals held that petitioner-appellant Slochower was not denied due process under the Fourteenth Amendment.

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Supreme Court of the United States

OCTOBER TERM, 1954

No. 385

MARY I. DANIMAN, MEYER CASE, LOUIS COHEN, HENRY F. MINS, LOUIS RELIN, LOUIS SPINDELL, IRVING GLUCKSMAN and MORRIS SELTZER,

Appellants,

against

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Appellee.

VERA SHLAKMAN, BERNARD F. REISS, SARAH R. RIEDMAN, HENRIETTA A. FRIEDMAN and MELBA PHILLIPS,

Appellants,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Appellee.

MOTION TO DISMISS APPEAL

November 5, 1954

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Supreme Court of the United States

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Appellants,

against

THE BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

Petitioners in each of the above cases (consolidated and heard as one in the courts of New York state) are teachers either in the public schools or public colleges maintained

by the City of New York. They ask this Court to review a determination of the New York courts that these teachers, by invoking the Fifth Amendment to the Federal Constitution as a basis for refusing to answer questions put to them by the Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate, forfeited their positions pursuant to New York City Charter § 903.

We urge this Court to dismiss the appellants' proposed appeal on the following grounds:

1. There is no substantial Federal question presented since this Court has ruled that the terms and conditions of public employment and the right of tenure in state or municipal civil service do not present Federal questions;

2. These appellants did not present, nor did the courts below pass upon, the Federal questions which they now allege to exist. Accordingly, they have not reserved the right to raise them now.

I. No Substantial Federal Question Is Presented by the Attempted Appeal

The New York state courts have interpreted § 903 of the New York City Charter to mean (1) that teachers in the public schools and colleges maintained by the City of New York are city employees within the meaning of § 903; and (2) that the Internal Security Sub-Committee of the United States Senate is a legislative body within the meaning of the statute. This Court has consistently ruled that it will be bound by the interpretation given to a state statute by the highest court of that state. *Barsky* v. *Board of Regents*, 374 U. S. 442, 448 (1954); *Winters* v. *New York*, 333 U. S. 507, 514 (1948); *Mooley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167.

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The Court of Appeals also ruled that a state statute, such as Charter § 903, may impose, as a condition of public employment, an obligation on its employees to testify fully and freely, when questioned by a legislative committee, including one of the Committees of Congress not only on matters affecting the interests of the public employer, but also as to his own official conduct as a public employee.

This Court has held consistently that public employment by a state or one of its municipalities is a matter of local concern, including the terms and conditions of such employment, the tenure rights and conduct of employees and the fixing of wages. An exception to this general rule is where a state, as a condition of employment, promulgates a requirement that its employees must foreswear membership in subversive organizations, without distinguishing between employees' innocent or knowing association with such organizations. *Wieman* v. *Updegraff*, 344 U. S. 183 (1952). Cf. *Garner* v. *Board of Public Works*, 341 U. S. 716 (1951); *Adler* v. *Board of Education*, 342 U. S. 485 (1952). Clearly the instant case does not fall within this exception.

No provision of the Federal Constitution deprives a state of power to modify or change the conditions of such employment as the public interest may warrant. *Higginbotham* v. *Baton Rouge*, 306 U. S. 535 (1939), rehearing denied 307 U. S. 649; *Dodge* v. *Board of Education*, 302 U. S. 74, 78-9; *Butler* v. *Penn.*, 10 How. 402, 416-7 (1850). The removal of a state or municipal employee from public employment does not present a federal question. *Preston* v. *Chicago*, 226 U. S. 447 (1113); *Walton* v. *House of Representatives of Oklahoma*, 265 U. S. 487 (1924).

II. The Asserted Constitutional Question Was Not Timely Raised

The appellants did not urge in the state courts that any provision of the Federal Constitution had been violated in declaring their public employment forfeit. The first mention of the Federal Constitution occurred when, after the New York Court of Appeals had ruled adversely, the petitioners requested reargument and sought to induce that court to certify that its decision was based upon an interpretation of the Federal Constitution. This, the New York Court of Appeals refused to do.

In an attempt to explain their failure to raise in the state courts the Federal questions they now allege to exist, the petitioners claim that the decisions of the state courts, especially that of the Court of Appeals, "took us by surprise" (Brief, p. 9). This is an obvious pretense since the decision of the Court of Appeals was an affirmance of the majority decision of the Appellate Division, Second Department, which in turn affirmed the holding of the Supreme Court, Kings County.

WHEREFORE, appellees respectfully move that the within appeal be dismissed or that the judgment and decree of the Courts of the State of New York herein be affirmed.

Dated, New York, November 5, 1954.

ADRIAN P. BURKE,
Corporation Counsel,
Attorney for Appellees.

LEO A. LARKIN,
DANIEL T. SCANNELL,
HELEN R. CASSIDY,
Of Counsel.

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No. 385. DANIMAN ET AL. *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. Appeal from the Court of Appeals of New York. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want

of a properly presented federal question. MR. JUSTICE BLACK would hold this case for the decision in No. 466, *Slochower* v. *Board of Higher Education of the City of New York* [probable jurisdiction noted, *post*, p. 935]. *Harold I. Cammer* and *Paxton Blair* for appellants. *Daniel T. Scannell* and *Helen R. Cassidy* for appellees. Reported below: 306 N. Y. 532, 119 N. E. 2d 373; 307 N. Y. 806, 121 N. E. 2d 629.

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